## RE GOH WAI KAH, EX P TAN LAY LEE

HIGH COURT MALAYA, KUALA LUMPUR
RAMLY ALI J
[BANKRUPTCY NO: D5-29-2525-2004]
7 FEBRUARY 2006

***BANKRUPTCY:*** *Public examination - Bankruptcy Act 1967, ss. 17 and 31 - Public examination of bankrupt - Whether Director General of Insolvency (DGI) could withdraw an ongoing public examination midstream - Powers to conduct and conclude public examinations - Whether lies with court - Whether creditors have legal interest and statutory right - Bankruptcy Act 1967, s. 17(4), (9) - Whether deputy registrar erred in allowing application of DGI to withdraw public examination*

***BANKRUPTCY:*** *Discovery of debtor's property - Bankruptcy Act 1967, ss. 17 and 31 - Public examination of bankrupt - Whether Director General of Insolvency (DGI) could withdraw an ongoing public examination midstream - Powers to conduct and conclude public examinations - Whether lies with court - Whether creditors have legal interest and statutory right - Bankruptcy Act 1967, s. 17 (4), (9) - Whether deputy registrar erred in allowing application of DGI to withdraw public examination*

This was an appeal by the judgment creditors ('the creditors') against the decision of the deputy registrar in striking out the public examination of the bankrupt based on an application made by the Director General of Insolvency (DGI) to withdraw the ongoing public examination of the bankrupt. The issues to be determined by the court were: (1) whether it was open to the DGI to withdraw the public examination after the court has made an order to hold the public examination and (2) whether the DGI could withdraw the ongoing public examination midstream. It was the submission of the DGI that the withdrawal would not prejudice the creditors because the creditors could initiate proceedings under s. 31 of the Bankruptcy Act 1967 ('the Act') to examine the bankrupt and related persons.

**Held (allowing creditors' appeal):**

**(1)** Once an order to hold the public examination either under s. 17 or s. 31 of the Act has been made by the court, it is not open to the DGI to withdraw the public examination until it has finally concluded. Further, the DGI could not withdraw

A an ongoing public examination midstream in view of the fact that the DGI has yet to produce documents which they were required by a court order to obtain. (para 61)

**(2)** The powers to conduct and conclude public examination
B under s. 17 and s. 31 of the Act is with the court, and not with the DGI. In exercising such powers, the court must take into consideration the interest of the creditors as well as the interest of the public. The creditors have a legal interest and statutory right in participating in the public examination
C (s. 17(4) of the Act). (para 62)

**(3)** The public examination herein was ongoing and yet to be concluded( s. 17(9) of the Act). Before an examination can be declared to be concluded and brought to an end, the DGI
D has neither the right nor authority to withdraw the said public examination. The deputy registrar had erred in allowing the DGI's application to withdraw the public examination. (para 68)

**(4)** The whole process of examination under s. 31 of the Act can
E be time consuming and very costly. At the end of the process, the truth may reveal that the bankrupt has no releasable assets or properties. In such a situation, if the examination is initiated and conducted fully by a creditor, the financial implication on him would be tremendous. The only alternative
F is that such an examination be initiated and conducted by the DGI, a fully paid government agency established for the purpose of relating to bankruptcy matters in general. An examination under s. 31 initiated and conducted by the DGI is more comprehensive and will obviously bring better results
G in the sense that the power of the court to order the person so examined to pay to the DGI or to deliver property to the DGI under s. 31(4) and (5) can only be made on the application of the DGI, not by the creditors. (para 77)

H *[Setting aside deputy registrar's decision; dismissing DGI's application to withdraw and reinstating the public examination.]*

**Case(s) referred to:**

*In re Atherton [1912] 2 KB 251* ***(refd)***

*In re Jawett [1929] 1 Ch 108* ***(refd)***

I *ln re Paget [1927] 2 Ch 85* ***(refd)***

*In re Wallace Gunson, Neale and Co [1960] NZLR 769* ***(refd)***

*Re Lau Kah Lay & Anor; ex p Cold Storage (M) Bhd [2001] 3 CLJ 960 HC* ***(refd)***

**Legislation referred to:**
Bankruptcy Act 1967, ss. 17(1), (4), (6), (9), 31(1), (2), (4), (5), 72, 109(1)(m)(i), 114(1)(a)

**Other source(s) referred:**
*William & Munir Hunter on Bankruptcy*, 19th edn, p 113

*For the creditors - Teh Meng Teck (Loke Pooi Gee with him); M/s Cheah Teh & Su*

*Reported by Suhainah Wahiduddin*

## JUDGMENT

### Ramly Ali J:

**[1]** This is an appeal by the judgment creditors (the creditors) to the judge in chambers against the decision of the learned deputy registrar dated 23 December 2005 in striking out the public examination of the bankrupt based on an application made by the Director General of Insolvency (DGI) to withdraw the ongoing public examination of the bankrupt *vide* the DGI's letter dated 19 December 2005.

### Factual Background

**[2]** Upon the judgment creditors' request, the DGI applied to the court for a public examination of the bankrupt to be conducted. Accordingly, the court had on 17 January 2005 allowed the DGI's aforesaid application and granted an order that a public examination of the bankrupt is to be conducted.

**[3]** Pursuant to the court order dated 17 January 2005, the public examination of the bankrupt commenced on 26 January 2005 and continued on 26 April 2005, 24 June 2005, 5 July 2005, 28 July 2005, 20 October 2005 and 26 October 2005.

### Court Order Dated 5 May 2005 – DGI To Produce Documents

**[4]** Due to *inter alia*:

(i) the bankrupt's evasiveness in answering questions;

(ii) his uncooperative attitude; and

(iii) his failure to produce numerous documents relating to his financial records,

A the public examination was prolonged as no meaningful public examination can be conducted without a complete set of the bankrupt's financial records being made available.

**[5]** The court on 5 May 2005 accordingly ordered the DGI to
B write to banks, financial institutions, stockbrokers, clubs, insurance companies and the Inland Revenue Board ("IRB") to obtain the bankrupt's financial records as follows:

(i) the bankrupt's income tax returns for years 1998, 1999, 2001, 2002 and 2004;

C

(ii) the bankrupt's wife's income tax return;

(iii) the bankrupt's credit card statements from the year 2000 onwards;

D (iv) the bankrupt's insurance policies and confirmation from insurance companies that the bankrupts policies have lapsed

(v) the bankrupt's statements of accounts from the bankrupt's stockbrokers from the year 2000 onwards;

E (vi) the bankrupt's RHB bank statements from the year 2000 onwards;

(vii) the bankrupt's EON Finance Bhd. statements;

(viii) the bankrupt's club's bills from the year 2000 onwards.

F **[6]** Six weeks after the deputy registrar made the order dated 5 May 2005, the DGI wrote to several banks *vide* letters dated 16 June 2005 and 29 June 2005 to furnish the DGI with the bankrupt's statement of accounts, particulars of charge(s), if any, and all documents pertaining to the bankrupt's accounts.

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**[7]** Similarly six weeks after the court made the said order dated 5 May 2005, the DGI wrote to the Inland Revenue Board ("IRB") *vide* letter dated 16 June 2005 to request for a copy of the bankrupt's income tax returns for the years 1998, 1999, 2001,
H 2002 and 2004. Other than 16 June 2005 and 29 June 2005 letters from the DGI, there is no follow up action on the part of the DGI to obtain the aforesaid documents/financial records of the bankrupt.

I **[8]** The creditors have *vide* letters dated 27 May 2005, 1 June 2005, 7 October 2005, 26 October 2005, 28 November 2005 and 12 December 2005 requested the DGI to furnish them with

copies of the documents obtained by the DGI pursuant to the order dated 5 May 2005 for purposes of the ongoing public examination.

**[9]** However, as at todate they have not received any of the aforesaid documents from the DGI with regard to the same nor has the DGI responded to any of their aforesaid letter.

**Three Witnesses Who have Been Subpoenaed Have Not Finished Giving Evidence**

**[10]** As the bankrupt claimed to have entered into numerous financial transactions with his family members and friends which were highly suspicious in that vast amounts of money were alleged to have been loaned by way of cash and of which the bankrupt claimed to have no records whatsoever, three family members of the bankrupt have been subpoenaed to give evidence and be examined in respect of the bankrupt's financial affairs and dealings.

**[11]** The bankrupt's wife, one Tang Mee Cheng ("TMC") and sister-in-law, one Tang Bee Ang ("TBA") gave evidence on 19 October 2005. As the said TMC and TBA failed to furnish documents required to be furnished pursuant to the subpoenas dated 15 July 2005, the examination of TMC and TBA could not be concluded on 19 October 2005.

**[12]** Due to insufficient time, the examination of the third subpoenaed witness, one Tang Soon Chye ("TSC"), a brother-in-law to the bankrupt could not proceed on 19 October 2005. The examination of TSC was later fixed on 10 November 2005. As TSC failed to attend court to give evidence on that subsequent date for examination on 10 November 2005, a warrant of arrest against TSC was ordered to be issued by the deputy registrar and the deputy registrar scheduled 18 November 2005 to give the said Tang Soon Chye a chance to show cause why he should not be committed for contempt of court. The proceedings for show cause why an order for committal should not be made against said TSC commenced on 18 October 2005.

**[13]** As can be seen from the summary above, the examination and the giving of evidence by these 3 subpoenaed witnesses as well as the show cause proceedings against said TSC have yet to be concluded at the time the DGI decided to apply to withdraw the public examination.

A **Offences Committed By The Bankrupt**

**[14]** Although the bankrupt claimed that he did not have in his possession numerous bank statements and credit card statements. The limited credit card statements which he was required to produce at the public examination were sufficient to show that he had run up credit in excess of RM1,000 from HSBC after he was adjudicated a bankrupt on 24 June 2003.

**[15]** Furthermore, the Bankrupt had on 20.10.2005 admitted to the Court during the public examination that he did not inform HSBC of his bankrupt status after he was adjudicated a bankrupt whilst possessing and continuing to use HSBC's credit card.

**[16]** Accordingly, as the bankrupt had *prima facie* incurred credit in excess of RM1,000 after he was adjudicated a bankrupt without informing HSBC of his bankrupt status, the bankrupt has committed an offence under the Bankruptcy Act 1967, namely s. 109(1)(m)(i).

**[17]** Accordingly, the creditors had by letter dated 20 December 205 alerted the DGI of the bankrupt's action as well as provided the DGI with the proof of the bankrupt's commission of the offence under s. 109(1)(m)(i) of the Bankruptcy Act 1967 (ie, the photocopies of the bankrupt's credit card statements).

**[18]** In fact, the creditors' letter on 20 December 2005 was the second time they brought to the attention of the DGI the commission of yet another offence by the bankrupt arising from evidence obtained during the ongoing public examination of the bankrupt. The first report of an offence under s. 109(1)(m)(i) of the Bankruptcy Act 1967 was lodged with the DGI *vide* our letter dated 11 November 2005.

**[19]** What is clear and irrefutable is that the public examination which had yet to be concluded, was very useful and necessary to extract evidence and information in relation to the bankrupt's financial dealings and property.

**[20]** In fact, the public examination has been and is useful in extracting evidence from the bankrupt relating to his financial affairs and property as can be seen in the documents and evidence produced in court so far.

**[21]** Based on the admissions of the bankrupt and the documentary evidence tendered in court during the public examination, it is clear that the bankrupt had committed offences

under the Bankruptcy Act 1967, namely under s. 114(1)(a) and s. 109(1)(m)(i). It is possible that the bankrupt had committed other offences which the creditors may have uncovered had the public examination not been struck off.

**Inspection Of DGI's Files**

**[22]** In the course of the public examination, the creditors requested and were allowed to inspect the DGI's files on the bankrupt. The DGI agreed to a "limited" inspection but was not agreeable to the photocopying of the documents of furnishing copies of the documents in the DGI's files.

**[23]** As it was relevant and useful to obtain copies of documents in the DGI's files and in view of the DGI's objections to a full inspection of their file (even though such inspection and photocopying is under the control of the court) submissions were then made to the court and the deputy registrar dismissed the DGI's objections on 10 November 2005 and ordered the DGI, Kuala Lumpur to allow the creditors unlimited inspection and photocopying of the DGI's files under the control of the court.

**[24]** The court then fixed 14 November 2005 and 15 November 2005 for inspection of the DGI's files in the court's premises and under the supervision of the court. Despite being informed and reminded of the court scheduled dates and times for inspection, the DGI failed to turn up in court. Both the court and the creditors' counsel waited in vain for the DGI to turn up in court on 14 November 2005 and 15 November 2005. As such, they could not inspect the files nor obtain any photocopies of the documents in the DGI's files on those dates.

**[25]** By letter dated 14 November 2005 the DGI alleged that as they had "searched" the court file and could not find any inspection date and therefore, they did not turn up in court. The DGI's letter although dated 14 November 2005 was only forwarded to the creditors on 17 November 2005.

**[26]** In view of the DGI's absence from court on 14 November 2005 and 15 November 2005, the court thereafter fixed 30 November 2005 and 1 December 2005 for inspection of the DGI's files.

**[27]** On 30 November 2005 date fixed by the court, the DGI turned up in court but refused to produce their files for inspection despite the court order of 10 November 2005 ordering them to do so.

A **DGI's Application To Withdraw Public Examination**

**[28]** Instead of producing their files for inspection, the DGI inexplicably orally applied to the senior assistant registrar (who was standing in for the deputy registrar) on 30 November 2005 to
B "withdraw the public examination".

**[29]** The creditors objected to the DGI's oral application to withdraw the public examination since the conduct of the public examination was already in the hands of and before the court. They further stated that as there is already in place a court order
C that the bankrupt be examined, the DGI was not entitled to "withdraw the public examination" at that state of the proceedings. The senior assistant registrar did not decide the DGI's oral application and adjourned the inspection of the DGI's files to 1 December 2005.
D

**[30]** On 1 December 2005, the DGI turned up in court but once again did not produce their files for inspection and repeated her oral application to "withdraw the public examination". The creditors made their submission to oppose the DGI's application
E to "withdraw the public examination" before the senior assistant registrar. However, in the midst of their submission in reply, the DGI's representative complained of being in pain and the senior assistant registrar adjourned the proceedings to 6 December 2005. In 6 December 2005, the creditors continued with and concluded
F their reply to oppose the DGI's oral application to withdraw the public examination.

**[31]** As the deputy registrar having conduct of the public examination was away on a course, the senior assistant registrar
G who was assigned by the deputy registrar to attend to the inspection of the DGI's files on 30 November 2005 and 1 December 2005 did not decide on the DGI's application to withdraw the public examination after hearing parties on 6 December 2005.

H **[32]** On 19 December 2005, when the deputy registrar having conduct of the public examination resumed her duties in court, the State Director of Insolvency repeated her application to withdraw the public examination.

I **[33]** When asked by the deputy registrar whether the DGI's office had in its entire history made an application to withdraw an ongoing public examination of a bankrupt, the State Director of Insolvency informed the deputy registrar that she was not aware

of any previous application for withdrawal of an ongoing public examination by the DGI. The State Director of Insolvency was then told to produce a letter from the DGI confirming that the DGI wished to apply to withdraw the public examination

**[34]** The creditors then drew the deputy registrar's attention to the fact that despite numerous appointments fixed by the court for inspection of the DGI's files, the DGI had either failed to turn up in court at all or turned up deliberately without the files thereby frustrating the court ordered inspection and effectively disregarding the order of court dated 10 November 2005.

**[35]** It was only after the creditors had protested to the court about the DGI's blatant disregard of the court order of 10 November 2005 that the DGI finally agreed to produce their files for inspection and taking of photocopies on that 19 December 2005 afternoon.

**[36]** Some files were eventually produced in court by the DGI's representative for their inspection on a without prejudice basis on that 19 December 2005 afternoon.

**[37]** As the State Director of Insolvency did not turn up in court as at 4.30pm the court fixed dates for the DGI and the creditors to file and serve their respective written submission on the DGI's application to withdraw the public examination. The court then scheduled the decision for the DGI's said application for 23 December 2005.

**[38]** On 19 December 2005, the creditors received a copy of the letter dated 19 December 2005 from the DGI, Kuala Lumpur branch to the deputy registrar enclosing the letter dated 1 December 2005 from the DGI to the State Director of Insolvency to withdraw the public examination and the grounds for the same.

**[39]** However, the creditors did not receive any written submissions from the DGI for the DGI's application to withdraw the public examination as directed by the court on 19 December 2005.

**[40]** Nevertheless, the creditors proceeded to file and serve their written submissions on 22 December 2005 as directed by the court on 19 December 2005.

**[41]** On 23 December 2005, the deputy registrar in allowing the DGI's application to withdraw the public examination, struck out the public examination of the bankrupt.

**Bankrupt's Application For Discharge Of Bankruptcy**

**[42]** Meanwhile, in the midst of the public examination to find out what happened to the bankrupt's assets and finances prior to his bankruptcy the bankrupt on 2 September 2005 applied for an order for discharge of the bankruptcy. The bankrupt's declared assets are not of a value equal to fifty per centum of the total of the debts admitted by the DGI.

**[43]** In fact, the amount offered to settle the bankrupt's outstanding debts due to his creditors represents less than 10% of the debts admitted by the DGI.

**Bankrupt's Application Form Discharge Is Premature**

**[44]** As the public examination of the bankrupt was still on going and not concluded at the material time, the creditors raised a preliminary objection to the bankrupt's said application for discharge of bankruptcy on 14 October 2005 on the ground that the bankrupt's said application is misconceived and ought to be dismissed or struck out with costs.

**[45]** As directed by the court, written submissions were filed by solicitors for the creditors. The senior assistant registrar originally fixed the preliminary objection for decision on 23 December 2005 and in the event the creditors' preliminary objection is disallowed, the hearing of the bankrupt's application for discharge of bankruptcy would be heard one week later, ie, on 30 December 2005. However, on 23 December 2005 the senior assistant registrar adjourned the decision of the preliminary objection (together with all other bankruptcy matters) because the DGI's representatives were not present in court. The decision for preliminary objection was then adjourned to 30 December 2005, the same day as the hearing of the bankrupt's application for discharge of bankruptcy on 30 December 2005 (if the preliminary objection was disallowed).

**[46]** As the outcome of this appeal against the withdrawal of the public examination before this court will have a bearing on the creditors' preliminary objection to the bankrupt's application for discharge which was fixed for decision on 30 December 2005, this appeal was filed under a certificate of urgency.

**[47]** On 30 December 2005, the senior assistant registrar informed the parties that he had been directed that all bankruptcy proceedings before the senior assistant registrar are to be adjourned pending the disposal of this appeal before this court. Accordingly, the senior assistant registrar fixed the delivery of his decision on the preliminary objection and the discharge application for mention on 17 February 2006.

**[48]** The DGI did not file any submissions in respect of the present appeal filed by the creditors. However, at the stage of the deputy registrar, there was a letter of withdrawal dated 1 December 2005 together with its grounds from the DGI whereby the DGI contended that the power to withdraw public examination is an absolute right of the DGI and the court function is just to decide on the issue of costs once the withdrawal is effective. The DGI further contended as the public examination in this case proceeded, the DGI had lost her function during the examination and the creditors should have conducted the examination by themselves under s. 31 of the Bankruptcy Act 1967.

**[49]** The creditors on the other hand submitted that the learned deputy registrar ought to have dismissed the DGI's application to withdraw or discontinue the ongoing public examination of the bankrupt bearing in mind that the bankrupt has yet to finish giving evidence and has yet to produce the documents he was ordered to produce; the three witnesses have yet to finish giving their evidence and the DGI has failed to produce to the court the documents they were required to obtain and produce.

### Issues Before The Court

**[50]** The following issues need to be determined by the court, namely:

(1) whether it is open to the DGI to withdraw the public examination after the court has made an order to hold the public examination.

(2) whether the DGI can withdraw the ongoing public examination midstream.

A

## Findings Of The Court

**[51]** Public examination of debtor is governed by s. 17 of the Bankruptcy Act 1967. Section 17 deals with examination of the debtor personally as to his conduct, dealing and property. In
B appropriate cases, an examination of the debtor may be followed by the process of discovery of the debtor's property under s. 31 of the same Act where the debtor, his wife (or husband) or any person known or suspected to have in his possession any of the estate on effects belonging to the debtor or supposed to be
C indebted to the debtor or any person whom the court deems capable of giving information respecting the debtor, his dealings or property, may be summoned before the court. Full provisions of s. 17 are reproduced below:

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17(1) Where the Court makes a receiving order, the Official Assignee may make an application to hold a public sitting on a day to be appointed by the Court for the examination of the debtor and the debtor shall attend thereat, and shall be examined as to his conduct, dealing and property:

E

Provided that when the debtor is a lunatic or suffers from any such mental or physical affliction or disability as in the opinion of the Court renders him unfit to attend his public examination the Court may dispense with such examination or direct the debtor to be examined in such manner and place as the Court thinks expedient.

F

(2) The examination shall be held as soon as conveniently may be after the expiration of the time for the submission of the debtor's statement of affairs and after the first meeting of creditors.

G

(3) The Court may adjourn the examination from time to time.

(4) Any creditor who has tendered a proof, or his representative authorized in writing, may question the debtor concerning his affairs and the causes of his failure

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(5) The Official Assignee shall take part in the examination of the debtor, and for the purpose thereof may, if specially authorized by the Attorney General, employ an advocate and solicitor but no advocate and solicitor shall be allowed to take part in the examination on behalf of the debtor.

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(6) The Court may put such question to the debtor as it thinks expedient.

(7) The debtor shall be examined upon oath, and it shall be his duty to answer all such questions as the Court puts or allows to be put to him.

(8) Such notes of the examination as the Court thinks proper shall be taken down in writing by the Registrar and shall be read over to and signed by the debtor, and may thereafter be used in evidence against him, and shall be open to the inspection of any Creditor at all reasonable times.

(9) When the Court is of opinion that the affairs of the debtor have been sufficiently investigated, it shall, by order, declare that his examination is concluded, but such order shall not preclude the Court from directing a further examination of the debtor as to his conduct, dealings and property wherever it sees fit to do so.

**[52]** Section 31(1) of the same Act provides as follows:

(1) The Court may, on the application of the Official Assignee or of any creditor who has proved his debt at any time after a receiving order has been made against a debtor, summon before it the debtor, or any wife of his, or any person known of suspected to have in his possession any of the estate or effects belonging to the debtor, or supposed to be indebted to the debtor or any person whom the Court deems capable of giving information respecting the debtor, his dealings or property and the Court may require any such person to produce any documents in his custody or power relating to the debtor, his dealings of property.

**[53]** Section 31(2) of the Act empowers the court by warrant to cause any person so summoned to be apprehended and brought up for examination if he refuses to come before the court at any time appointed or refuses to produce any such document, having no lawful impediment made known to the court at the time of its sitting.

**[54]** The object of the public examination under both ss. 17 and 31 of the Bankruptcy Act 1967 is not merely for the purpose of collecting the debts on behalf of the creditors or of ascertaining simply what sum can be made available for the creditors who are entitled to it, but also for the purpose of the protection of the public in the cases in which the bankruptcy proceedings apply, and that there shall be a full and searching examination as to what

A has been the conduct of the debtor in order that a full report may be made to the court by those who are charged to carry out the examination of the debtor, (see: *In re Paget* [1927] 2 Ch. 85)

**[55]** All the relevant parties ie, the DGI who makes application B for the public examination, the creditors who take part in the public examination and the deputy registrar of the High Court who considers and allows the application for the public examination must in the first place appreciate these purposes of the public examination before the proceedings start. To borrow C the words of Lord Hanworth MR in *In re Paget*, "to concentrate attention upon that mere debt collecting and distribution of assets is to fail to appreciate one very important side of bankruptcy proceedings and law."

D **[56]** *In re Paget* is a clear authority that the public examination is partly for the protection of the public. This principle was adopted by Astbury J in *In re Jawett* [1929] 1 Ch. 108. The same principle was earlier enunciated in the case of *In re Atherton* [1912] 2 KB 251 where Phillimore J held that the purpose of the public examination as well as the Bankruptcy Act is to secure a full and E complete examination and disclosure of the facts relating to the bankruptcy in the interest of the public and not merely in the interests of the creditors.

**[57]** The true construction of s. 17(1) of the Bankruptcy Act F 1967 is that the DGI in exercising his powers and duties under the Act may make an application to hold a public examination for the purpose of examining the debtor as to his conduct, dealing and property. In fact, it is more appropriate to say that the DGI is duty bound to make such an application for the public G examination of the debtor under s. 17 in order to facilitate the exercise of his duties trusted upon him under s. 72 of the same Act, which provides:

> 72. As regards the debtor, the Official Assignee shall:
>
> H (a) investigate the conduct of the debtor, and report to the Court stating whether there is reason to believe that the debtor has committed any act which constitutes an offence under this Act or under section 421, 422, 423 or 424 of the Penal Code or which would justify the Court in refusing, I suspending or qualifying an order for his discharge;
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> (b) make such other reports concerning the conduct of the debtor as the Court directs or as may be prescribed;

(c) take such part as may be directed by the Court or prescribed in the public examination of the debtor;

(d) take such part and give such assistance in relation to the prosecution of any fraudulent debtor or any other person charged with an offence under this Act, as the Public Prosecutor may direct.

**[58]** The DGI in making such an application must have in his (or her) mind the true purpose of the public examination ie, not only to collect the debts on behalf of the creditors, but also for the purpose of the protection of the public.

**[59]** The court (the deputy registrar) in considering whether to allow or dismiss such an application made by the DGI must also appreciate the true purpose of the public examination applied for.

**[60]** Once the application has been granted by the court the examination must proceed until the end ie, when the court is of opinion that the affairs of the debtor have been sufficiently investigated and concluded (as stipulated under s. 17(9) of the Act).

**[61]** In the present case, the public examination has been granted. The court has also conducted the public examination. It is no longer at the stage of the DGI applying to the court for such public examination to be held. It is not open for the DGI, now to withdraw the public examination at his (or her) whims and fancies, particularly so when the examination has proceeded midstream in view of the fact that the DGI has yet to produce documents which they were required by a court order to obtain; the three witnesses subpoenaed have yet to finish giving their evidence; and the examination of the bankrupt was still ongoing and some documents which he was required to produce have yet to be produced.

**[62]** Furthermore, the creditors have a legal interest and statutory right in participating in the public examination. That the creditors have such a legal interest and a statutory right is clearly spelt out in s. 17(4) of the Bankruptcy Act 1967 which states that:

(4) Any creditor who has tendered a proof, or his representative authorized in writing, may question the debtor concerning his affairs and the causes of his failure.

**[63]** A careful perusal of s. 17 of the Bankruptcy Act 1967 would show that not only the DGI and the creditors have an interest in the public examination but the court as well in that s. 17(6) of the Bankruptcy Act 1967 expressly provides that the court may put such question to the debtor as it thinks expedient.

**[64]** Hence, it is therefore crystal clear that not only the DGI but the court and more importantly the creditors have rights *vis-a-vis* the conduct of the public examination and that such rights do not exclusively belong to the DGI, as alleged by the DGI in her letter dated 1 December 2005.

**[65]** The fact that the DGI is not entitled to withdraw the public examination as of right is reinforced and made abundantly clear by s. 17(9) of the Bankruptcy Act 1967 which expressly provides as follows:

> (9) When the Court is of opinion that the affairs of the debtor have been sufficiently investigated, it shall, by order, declare that his examination is concluded, but such order shall not preclude the Court from directing a further examination of the debtor as to his conduct, dealings and property whenever it sees fit to do so.

**[66]** In the present case, the public examination ordered to be conducted has yet to be concluded. It is very clear from the wording of s. 17(9) of the Bankruptcy Act 1967 that the sole authority to "declare that his examination is concluded" lies with the court only and not the DGI. The court only declared that the examination is concluded if he is satisfied that the bankrupt has been fully and sufficiently investigated, but not midstream.

**[67]** It is relevant to note that there is absolutely no authority whatsoever, be it the Bankruptcy Act 1967 or the Bankruptcy Rules 1969 or any case law whether local or overseas was cited by the DGI to support their unprecedented application to withdraw the public examination midstream. The DGI's application is inconsistent with the express provisions of the Bankruptcy Act 1967, particularly ss. 17, 31 and 72.

**[68]** The public examination in the present case is ongoing and yet to be concluded and premised on the express provision in s. 17(9) of the Bankruptcy Act 1967 requiring "that the affairs of the debtor must has been sufficiently investigated", before an examination can be declared to be concluded and brought to an end, the DGI has neither the right nor authority to withdraw the said public examination.

**[69]** The classical authority on this issue is found in the case *In re Wallace Gunson, Neale and Co.* [1960] NZLR 769; [1960] NZLR Lexis 27, where the Supreme Court in Auckland was dealing with an application which involved an issue of the court being satisfied that the bankrupt's affairs have been sufficiently investigated and that his examination is finished. Hardie Boys J in that case, held:

> A rough check shows that on over one hundred occasions a non-committal answer was given to questions put either by counsel for the Official Assignee or by counsel for one of the creditors represented at the hearing. These non-committal answers took various forms such as, "I believe so"; or "I understand so", "I assume so"; "It appears so"; "I am unable to explain that"; "I have no evidence to the contrary"; "I cannot recall" "Not to my knowledge"; "I cannot be specific on that point".
>
> When, at the conclusion of the proceedings, application was made for an order pursuant to s. 124(7) of the Bankruptcy Act 1908 declaring in the case of each bankrupt that his affairs have been sufficiently investigated and that his examination is finished, it came as some surprise to me, in the light of what I have just set out, that counsel for the Official Assignee and for those creditors who were present uniformly stated that they had no instructions to object to the making of such an order. I deferred consideration of these applications in order to determine whether the public examination of a bankrupt is so much a matter in the hands of the Official Assignee and of such creditors as are represented thereat, as to warrant the Court dealing with the order contemplated by s. 124(7), in effect, by consent. In my view, that cannot be so. The bankrupt is required to attend and to answer on oath all such questions as the Court puts or allows to be put to him relative to his conduct, dealings and property.
>
> The order sought is one for the Court to make or to withhold, and involves the Court being satisfied that the bankrupts' affairs have been sufficiently investigated and that his examination is finished. I find myself quite unable solemnly to declare by an order under s. 124(7) that such is the case at the present time, notwithstanding the absence of objection from those represented at the hearing.

**[70]** In the present case, the public examination is clearly not finished yet and not sufficiently investigated in views of the following facts:

(a) the bankrupt was evasive in answering questions;

(b) the bankrupt seems not to be cooperative during the examination;

(c) the bankrupt has failed to produce numerous documents relating to his financial records;

(d) the DGI has not produced some documents relating to the bankrupt's accounts;

(e) the DGI has not followed up on his request for information relating to the bankrupt's financial affairs with some banks, financial institutions, stockbrokers, clubs, insurance companies and the Inland Revenue Board as ordered by the court on 5 May 2005;

(f) three witnesses who have been subpoenaed have not finished giving evidence;

(g) the bankrupt had *prima facie* incurred credit in excess of RM1,000 after he was adjudicated a bankrupt without informing the bank of his bankrupt status, this committing an offence under s. 109(1)(m)(i) of the Bankruptcy Act 1967;

(h) the DGI's persistent disobeyance of the court order to allow inspection by the creditors of the bankrupt's files kept by the DGI's office and to make photocopy of the relevant documents from the files; and

(i) the bankrupt's application for discharge of the bankruptcy with the amount offered to settle the bankrupt's outstanding debts due to his creditors represents less than 10% of the total debts admitted by the DGI.

**[71]** All the facts above raised serious doubt as to the genuiness and *bona fide* of the DGI's application to withdraw the public examination. There are a lot more questions that need to be answered and cleared before the public examination can be concluded and come to an end. The public interest as well as the interest of the creditors demand that the public examination to proceed until all the questions and doubts above be answered and cleared. The bankrupt cannot be allowed to obtain undue advantage of the withdrawal of the public examination just because the DGI feels that he is no more interested in the examination. To borrow the words of Ian Chin J in the case of *Re Lau Kah Lay & Anor; ex p Cold Storage (M) Bhd.* [2001] 3 CLJ 960, "the OA carries the onerous task of ensuring that a bankrupt has no hidden assets stashed away, whether in his name or in the name of his wife or children, as otherwise people will be imbued

with the message that money borrowed could be stashed away and need not be repaid and such horde can be enjoyed even when one is a bankrupt. If the office of the OA does not show itself equal to the task of preventing such rip-off of the creditor then cases of borrowers not repaying and not minding to be made bankrupt would be the rule rather than the exception. Then, business morality would decline."

**[72]** We have heard cases where bankrupts live a life of luxury, staying in big bungalows, driving expensive cars (sometimes chauffer driven), going on overseas trips, enjoying club memberships and many others. All such matters gave rise to a suspicion and very highly at that, the possibility existed that the assets of the bankrupt may have found their way to their wives, relations and other close associates. It is the paramount duty of the DGI (and the court as well) to ensure such a situation ceased. The DGI's withdrawal of the public examination midstream in the present case is obviously not consistent with the effort to curb the above situations.

**[73]** In her letter dated 1 December 2005 addressed to the Pengarah Insolvensi Negeri, Jabatan Insolvensi Malaysia, Cawangan Wilayah Persekutuan, directing her to withdraw the public examination, the DGI gave a number of grounds. The said letter was forwarded to the learned deputy registrar when the application to withdraw the public examination was made orally. One of the grounds is that the withdrawal will not prejudice the creditors in the sense that the creditors can initiate proceedings under s. 31 of the Bankruptcy Act 1967 to examine the bankrupt and all the related persons.

**[74]** Under s. 31 of the Act the court may, on the application of the official assignee or of any creditor who has proved his debt at any time after a receiving order had been made against a debtor summon before it the debtor or a wife of his, or any person known or suspected to have in his possession any of the estate or effects belonging to the debtor or supposed to be indebted to the debtor or any person whom the court deems capable of giving information respecting the debtor, his dealings or property. For that purpose, the court may require any such person to produce any documents in his custody or power relating to the matters in question. Section 31(4) and (5) of the Act provides as follows:

A (4) If on the examination of any such person it appears to the Court that he is indebted to the debtor the Court may, on the application of the Official Assignee, order him to pay to the Official Assignee, at such time and in such manner as to the Court seems expedient, the amount in which he is
B indebted or any part thereof, either in full discharge of the whole amount in question or not as the Court thinks fit, with or without costs of the examination.

(5) If on the examination of any such person it appears to the Court that he has in his possession any property belonging
C to the debtor the Court may, on the application of the Official Assignee, order him to deliver to the Official Assignee such property or any part thereof at such time and in such manner and on such terms as to the Court seems just.

D **[75]** The court cannot agree with the ground given by the DGI in respect of this issue. No doubt, besides the DGI, the creditors who have proved his debt can initiate and conduct a proceeding for examination under s. 31 of the Act. But the status and background of a creditor is not the same with the DGI in this
E case. The DGI is a government agency fully paid by the government, and exercising his powers and duties entrusted by an Act of Parliament ie, the Bankruptcy Act 1962. On the other hand, a creditor cannot afford to take further steps that involves costs to him, as he is already saddled with a debt he has yet to
F recover. Therefore, it is unreasonable to expect him to spend money to do the things which the DGI is authorized to do under the Bankruptcy Act 1967 (see: *Re Lau Kah Lay & Anor; exp. Cold Storage (M) Bhd.*).

G **[76]** The powers contained in s. 31 of the Act are primarily directed to enabling the court to help the DGI or the creditors in bankruptcy to discover the truth of the circumstances relating to the bankrupt's property, dealings and affairs, with as little expense and as much expedition as possible, and with a particular view to
H the recovery of assets and ascertainment of the validity of creditor's claim, (see: *William & Munir Hunter on Bankruptcy* (19th edn) at p. 113).

**[77]** The whole process of examination under s. 31 of the Act
I can be time consuming and very costly. At the end of the process, the truth may reveal that the bankrupt has no releasable assets or properties. In such a situation, if the examination is initiated and conducted fully by a creditor the financial implication

on him will be tremendous. He has not been paid of his debt by the bankrupt and on top of that he has to bear the huge amount of costs for the examination process. The only alternative is that such an examination was to be initiated and conducted by the DGI, a fully paid government agency established for the purpose relating to bankruptcy matters in general. An examination under s. 31 initiated and conducted by the DGI is more comprehensive and will obviously bring better results in the sense that the power of the court to order the person so examined to pay to the DGI or to deliver property to the DGI under s. 31(4) and (5) can only be made on the application of the DGI, not by the creditors.

## Conclusion

**[78]** Based on the above consideration, the court concludes that:

(a) Once an order to hold the public examination either under s. 17 or s. 31 of the Bankruptcy Act 1967 has been made by the court, it is not open to the DGI to withdraw the public examination until it has been finally concluded;

(b) the DGI cannot withdraw an ongoing public examination midstream;

(c) the powers to conduct and conclude public examination under s. 17 and s. 31 of the Bankruptcy Act 1967 is with the court, and not with the DGI as maintained by the DGI in her letter dated 1 December 2005;

(d) in exercising such powers, the court must take into consideration the interest of the creditors as well as the interest of the public;

(e) in the present case, the learned deputy registrar has erred in allowing the DGI's application to withdraw the public examination;

(f) therefore, the appeal by the creditors is allowed with no order as to costs. The learned deputy registrar's decision dated 23 December 2005 in allowing the DGI's application to withdraw the public examination be set aside; that the DGI's application to withdraw the public examination be dismissed and that the public examination be reinstated and a date to be fixed for the continuation for the public examination.